

NEW HAMPSHIRE HUMAN RIGHTS COMMISSION

No: ES(H)(R) 0217-03, 16DA300194

Bonnie Usher,

Charging Party,

v.

Cracker Barrel Old Country
Store, Inc.,

Respondent

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NH COMMISSION
FOR HUMAN RIGHTS

COMMISSIONS' FINDINGS AND RULINGS

A. Introduction

1. Bonnie Usher's charge was received by the Commission on January 17, 2003. She alleges that Cracker Barrel unlawfully discriminated against her on the basis of her sex by permitting a sexually hostile work environment to exist in the Londonderry, New Hampshire Cracker Barrel restaurant at which she was employed as a grill cook.
2. The Respondent, Cracker Barrel, filed a position statement in response to Usher's charge denying her allegations of discrimination.
3. Following an investigation of Usher's charges, a probable cause finding was issued with respect to the time period from January 1, 2001 through September 30, 2002. The circumstances that resulted in Usher's separation from employment with Cracker Barrel in 2004 are irrelevant and have not been considered by the Commission in rendering its Order.
4. A public hearing was conducted in Concord, New Hampshire on February 14 and April 5, 2006. The parties were represented by counsel and the following witnesses testified in

the course of the public hearing: (a) Bonnie Usher; (b) Amauricio Galindo, a co-worker of Usher's at the Londonderry Cracker Barrel; (c) Peter Lootens, a former Assistant Manager at the restaurant; (d) Paul O'Rourke, who served as the General Manager of the Londonderry Cracker Barrel during most of the time period at issue; (e) Josephine Webb, a server at the restaurant; (f) Mark Ross, a former grill cook at the restaurant; and (g) Bonnie Usher's partner, Wendy Dickey.

5. By agreement of the parties, portions of transcripts from the pre-hearing depositions were entered into evidence and the Commission accepted various other exhibits submitted by the parties.

Findings of Fact

6. The Respondent, Cracker Barrel Old Country Store, Inc., is headquartered in Lebanon, Tennessee and runs a chain of restaurants and gift stores with locations throughout the United States.
7. The Complainant, Bonnie Usher, was employed as a grill cook at the Cracker Barrel Restaurant in Londonderry, New Hampshire from September, 2000 through June, 2004. Bonnie Usher's claims of sexual harassment are predicated on various incidents that she contends gave rise to a hostile work environment at the Londonderry restaurant during the limited period of time at issue. Specifically:
 - That on a number of occasions, a grill cook with whom she worked, Patrick Graham, used offensive language while singing along to music playing on the radio in the restaurant kitchen.

- That another grill cook with whom she briefly worked, Liam Delorey, used vulgar language toward Usher regarding her sexual orientation.
- That another co-worker, Amauricio Galindo (who was working as a dishwasher for Cracker Barrel at the time), bumped into her on several occasions in the kitchen in an unnecessary and sexually suggestive manner.
- Finally, the Complainant asserts (a) that an allegedly suggestive photograph depicting Graham and Usher (which Usher claims was taken without her knowledge) was posted for a brief period of time on an employee bulletin board at the Londonderry restaurant, before Usher removed it; and (b) that a few offensive drawings were placed on a message board used by employees in the kitchen.

The Complainant does not contend that a Cracker Barrel supervisor engaged in harassing behavior toward her. She does assert that Cracker Barrel's management failed to respond appropriately after she had informed them orally of the harassment.

8. The Respondent acknowledges and the Commission finds that Patrick Graham, on at least one occasion, was singing along to music on the radio in a manner that was offensive to the Complainant. Management was made aware of the offensive conduct and the Commission finds that Manager O'Rourke curtailed the behavior. The Complainant testified that Patrick Graham's offensive behavior continued after management intervened; however, no corroborative testimony was brought forward by the Complainant. The Commission finds that the Complainant has failed to meet her burden of proof in establishing that management knew or should have known that such conduct continued after Graham was warned that such would not be tolerated.

The Complainant testified that employee, Liam Delorey, used offensive language towards her on several occasions regarding her sexual orientation. The Complainant testified that employee Delorey's length of employment extended substantially beyond the short period of employment established through wage and hour exhibits produced by the Respondent. The Commission finds that the Complainant failed to meet her burden of proof that management knew or should have known that employee Delorey used offensive language towards the Complainant.

10. The Commission has considered the evidence concerning the Complainant's allegations that co-worker Galindo bumped her on several occasions in the kitchen in an unnecessary and sexually suggestive manner. No evidence was submitted that the Cracker Barrel management was aware of such conduct, which, on reflection, may have been inadvertent.
11. The Commission does find that a photograph of the Complainant and employee Graham was taken without her knowledge depicting a sexually suggestive gesture. The Commission will accept the Complainant's testimony that the photograph was posted on an employee bulletin board and that offensive drawings were placed on the message board from time to time. The Commission notes, however, that the Complainant testified that she did not notify management of such postings.

Rulings of Law

12. Where a Complainant claims to have been sexually harassed by a co-worker who is not a supervisor nor in management, the employer may be held liable for such conduct only if the Complainant demonstrates that the employer was aware or should have been aware of the offensive conduct and failed to take prompt and appropriate remedial action.

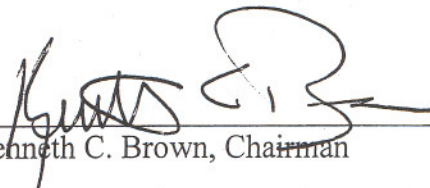
O'Rourke v. City of Providence, 235 F.3d, 713, 736 (1st Cir. 2001). Applying the foregoing to facts as found by the Commission, we conclude that the Complainant has failed to establish that management knew or should have been aware of the conduct at issue, other than Patrick Graham's inappropriate conduct, which was addressed appropriately by the Respondent's general manager.

13. The Commission finds for the Respondent.
14. The parties' Requests for Findings of Fact and Rulings of Law that are inconsistent with the above are hereby denied.

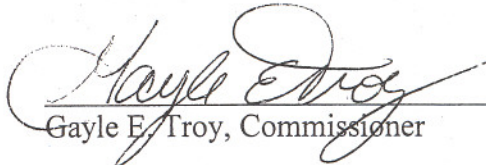
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Kenneth C. Brown, Chairman


Laura D. Simoes, Commissioner


Gayle E. Troy, Commissioner